



WASHINGTON STATE
DEPARTMENT OF
E C O L O G Y

Report on Impacts of ESHB 1010 Significant Legislative Rule Making

October 2001

Publication No. 01-01-006

Report on Impacts of ESHB 1010 Significant Legislative Rule Making

Prepared by:
Washington State Department of Ecology
Office of Intergovernmental Relations
Rules Unit

October 2001

Publication No. 01-01-006

Introduction

Engrossed Substitute House Bill (ESHB) 1010, the omnibus regulatory reform act, imposes new regulatory duties on all state agencies. It also requires the Office of Financial Management (OFM) to report to the Legislature on how state agencies are carrying out provisions of this law. Some reporting requirements were eliminated, but one still remains.

Revised Code of Washington (RCW) 34.05.328(6) requires OFM to report to the Governor and the Legislature in January of each even-numbered year. The report must address how agencies are implementing significant legislative rule-making requirements, as defined in RCW 34.05.328.

This report addresses the requirements of RCW 34.05.328 and how they relate to the Washington State Department of Ecology. The report includes the following:

- A list of rules Ecology has adopted under significant legislative rule-making requirements (RCW 34.05.328) since January 1, 2000, and how compliance with these requirements affected the content of the rule.
- A summary of additional costs associated with the more intensive rule-making requirements.
- A description of legal actions against Ecology for failure to comply with RCW 34.05.328.
- The extent to which significant legislative rule-making requirements have adversely impacted Ecology's ability to fulfill its mission.
- Descriptions of any decrease or increase in the acceptability by the regulated community of rules adopted under the significant legislative rule-making requirements.
- A summary of comments from stakeholders on the impacts of the significant legislative rule-making requirements.

Rules Adopted Under Significant Legislative Rule-making Requirements

- Instream Resources Protection Program for WRIA 3 and 4: Lower and Upper Skagit River Watershed, Chapter 173-503 WAC
- Shoreline Master Program Guidelines, Chapter 173-26 WAC
- Model Toxics Control Act Cleanup Regulation, Chapter 173-340 WAC
- Outdoor Burning, Chapter 173-425 WAC
- Dangerous Waste Regulations, Chapter 173-303 WAC

Compliance with Section 328 of the Administrative Procedure Act (APA)

The changes reflected in section 328 of the APA, as well as changes throughout Chapter 34.05 RCW, have had profound impacts on the content of Ecology regulations; some apparent, some not so apparent. In either case, Ecology rules adopted today are done so with a better, more complete awareness of the potential impacts of our rulemaking. To say that amendments to the APA have had no impact on the content of our rules would be incorrect; but to document all examples would be nearly impossible.

The difficulty stems from the fact that many, if not all of the APA changes, have now become standard operating procedure at Ecology. What once seemed a monumental undertaking is now just another step in the process. This “process” creates clear, recognizable accountability throughout the various stages of rule development and provides for thought provoking and deliberate dialogue with our stakeholders.

An example of this deliberate dialogue occurred in the development of the Skagit River rule (Ch.173-503 WAC). By engaging the local community interests, including tribal fisheries representatives and municipal water suppliers, Ecology was encouraged to go beyond conventional approaches to setting instream flows. These recommendations posed technical and legal challenges that Ecology only overcame after considerable internal review.

A direct impact of section 328 deals with the requirement for an implementation plan. During the development of the Implementation Plan for the Model Toxics Control Act Cleanup rule (Ch.173-340 WAC) Ecology decided to delay the effective date of the rule amendment. The decision to delay the effective date for six months from the adoption date was made for two reasons. First, there was the recognized need to train Ecology staff, the regulated community and the general public on the changes being made to the existing rule. To date, Ecology has provided training to approximately 500 interested persons. Second, there was the need to develop some key policies to facilitate implementation of the rule amendments, as well as to follow through with some commitments made by Ecology with members of an external advisory group.

By delaying the effective date of the rule, the department has put in place the necessary elements that will contribute to the successful implementation of the MTCA rule amendments.

The shoreline rule (Ch.173-26 WAC) was also affected by section 328. As a result a new version of the proposal was developed, and a new round of hearings were conducted to account for the many comments and rule language changes that had been requested during the first set of public hearings. These changes included definitions and ESA related terminology; wetlands, mining, agriculture and shoreline environment designation provisions, and clarification regarding shoreline restoration policy.

Summary of Additional Costs Associated with More Intensive Rule-making

Actual costs were not accounted for during the rule-making process. The requirements of ESHB 1010 have been folded into Ecology’s rule development process and are not treated as separate costs. It is likely that many of the requirements would have been addressed in the absence of the 1010 mandate. In most cases, any additional costs could be associated with the economic analysis required and informing and educating those affected by the rule.

Description of any legal actions against Ecology for failure to comply with RCW 34.05.328, costs of such actions, and the status or outcome of the action.

Ecology's adoption of the Shorelines Master Program Guidelines rule (Ch.173-26 WAC) on November 29, 2000 was appealed to the State of Washington Shorelines Hearings Board (SHB) on multiple counts, including failure to prepare a SBEIS, and failure to submit for public comment an agency implementation plan and a benefit cost analysis. The SHB, in its August 27, 2001 decision invalidated the rule as a result of these procedural flaws. All principal parties in the suit, including Ecology, have appealed the SHB decision to the Thurston County Superior Court. Individual costs of such action by the department have not been separately accounted for. The outcome of these appeals is unknown at this time.

With the Skagit River rule (Ch.173-503 WAC), a private interest engaged Ecology in a series of legal discussions regarding the applicability of the proposed and adopted rule to their hydroelectric power operations. They were assured that their existing state water rights were not subject to the rule. No legal action was taken.

Adverse effects. The extent to which significant legislative rule-making requirements have adversely affected the capacity of Ecology to fulfill its legislatively prescribed mission.

The significant legislative rule making requirements have added considerable burden to the process of updating existing rules and have contributed to the delay in adopting rules such as the shoreline guidelines. APA requirements compel Ecology rule writers to monitor and comply with procedural and administrative requirements, in addition to addressing substantive requirements of the statute being implemented. This requires documentation and demonstration of compliance. Specifics are not known as to what degree these additional requirements add to improved quality of rule making.

During the development and adoption of the Skagit River rule (Ch.173-503 WAC), pending water right applications were put on hold while protracted rule making proceeded. However, the water rights administration statute supported this holding action.

Rule acceptability. Descriptions of any measurable increase or decrease in the acceptability by the regulated community of rules adopted under these requirements.

In addition to the delayed implementation of the MTCA rule (Ch.173-340 WAC), Ecology voluntarily provided to the public a draft copy of the *Estimates of the Probable Costs and Benefits of the Amendments to the Model Toxics Control Act Cleanup Regulation*. While it is not required that the public have an opportunity to review and comment on this document before a rule is adopted, both Ecology and the regulated community benefited by this action.

It is perceived that these two voluntary actions, public review and delayed implementation, contributed significantly to the acceptability of these rules by the general public and regulated community.

Stakeholder comments. Comments from counties, cities, businesses, labor, and environmental organizations on the impacts significant legislative rule-making requirements.

Several business interests commented during the Skagit River rule (Ch. 173-503 WAC) adoption that the significant legislative rule-making requirements were important to their acceptance of the adopted rule. They were also willing to continue informal consultations to participate as fully as possible in the rule-making process.